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No. 94-1453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

D. GRANT PEACOCK,
Petitioner,

v.

JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. NEITHER ERISA NOR FEDERAL COMMON LAW PROVIDES A POST-JUDGMENT CAUSE OF ACTION FOR PIERCING THE VEIL OF A CORPORATE FIDUCIARY OR JUDGMENT DEBTOR	1
A. ERISA	1
B. Federal Common Law	3
II. THERE IS NEITHER A CONSTITUTIONAL BASIS NOR A POLICY JUSTIFICATION FOR ANCILLARY JURISDICTION OVER THIS STATE LAW MATTER	9
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Alexander v. Hillman, 296 U.S. 222 (1935)	12, 16
Anderson v. Abbott, 321 U.S. 349 (1944)	8
Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986)	14
Buckley Dement, Inc. v. Travelers Plan Adm'rs, 39 F.3d 784 (7th Cir. 1994)	4
Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)	14
Connors v. P&M Coal Co., 801 F.2d 1373 (D.C. Cir. 1986)	6
Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959)	12
Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329 (1887)	11, 12
Dugas v. American Surety Co., 300 U.S. 414 (1937)	13, 14, 15
Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 F.2d 295 (2d Cir. 1927)	18
Finley v. United States, 490 U.S. 545 (1989)	12, 19
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)	4
H.C. Cook Co. v. Beecher, 172 F. 166 (C.C.D. Conn. 1909)	17
H.C. Cook Co. v. Beecher, 217 U.S. 497 (1910)	16, 17, 18
J.M. Resources Inc. v. Petro-Pak Resources, Ltd., 581 F. Supp. 629 (D. Colo. 1984)	18
Karcher v. May, 484 U.S. 72 (1987)	16
Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673 (1994)	10, *passim*
Krippendorf v. Hyde, 110 U.S. 276 (1884)	12, 20
Labette County Commissioners v. United States ex rel. Moulton, 112 U.S. 217 (1884)	15, 16
Local Loan Co. v. Hunt, 292 U.S. 234 (1934)	14, 19
Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988)	8
Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988)	5
Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993)	2, *passim*

TABLE OF AUTHORITIES—Continued

	Page
Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609 (1864)	12, 15
Miree v. DeKalb County, 433 U.S. 25 (1977)	9
O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994)	5, 7, 19
Owen Equip. & Erec. Co. v. Kroger, 437 U.S. 365 (1978)	11, 12
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986)	14
Reich v. Compton, 57 F.3d 270 (3d Cir. 1995)	4
Reich v. Rowe, 20 F.3d 25 (1st Cir. 1994)	3
Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868)	15, 16
Riverdale Cotton Mills v. Alabama & Ga. Mfg. Co., 198 U.S. 188 (1905)	15
Root v. Woolworth, 150 U.S. 401 (1893)	14
Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977)	8
Skevofilax v. Quigley, 810 F.2d 378 (3d Cir. 1987) *en banc*	10
Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950)	12
Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)	4
United States v. Cordova Chem. Co., 59 F.3d 584 (6th Cir. 1995)	4
Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982)	19
Wesch v. Folsom, 6 F.3d 1465 (11th Cir. 1993)	14
Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131 (2d Cir. 1991)	2
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	16, 20

STATUTES AND RULES

11 U.S.C. §§ 303 ff.	13
28 U.S.C. § 2283	14
29 U.S.C. § 1002(5)	5
29 U.S.C. § 1109(b)	6

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 1132(a)	1
29 U.S.C. § 1145	5
Fed. R. Civ. P. 69(a)	16
Fed. R. Civ. P. 82	16
OTHER AUTHORITIES	
1 W. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*	2, 9

REPLY BRIEF FOR THE PETITIONER

I. NEITHER ERISA NOR FEDERAL COMMON LAW PROVIDES A POST-JUDGMENT CAUSE OF ACTION FOR PIERCING THE VEIL OF A CORPORATE FIDUCIARY OR JUDGMENT DEBTOR.

Neither the Fourth Circuit nor the United States in its *amicus* brief argues that ERISA provides a cause of action in this case. Indeed, by leaping immediately to the last resort of ancillary jurisdiction, the court of appeals and the Government seem implicitly to concede this point. Because respondent and other *amici* argue in favor of an ERISA cause of action, however, and because the absence of an ERISA cause of action is relevant to the decision on ancillary jurisdiction, we deal first with ERISA.[1]

A. ERISA.

Respondent suggests in his brief, Resp. Br. at 5-6, for the first time in this litigation, that the action below can be justified as one pursuant to Section 502(a)(3) of ERISA, which authorizes the bringing of a civil action "to obtain other appropriate equitable relief (i) to redress such violations [of this subchapter or the terms of the plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(B).

1. Section 502(a)(3) does not apply here. First, the relief sought and obtained here—a money judgment

[1] The existence *vel non* of an ERISA cause of action is particularly critical here, because in the absence of an ERISA cause of action respondent could not rely on ERISA's provision for nationwide service of process. *See* Pet. Br. at 28 n.18. Consequently, the Court would have to, at a minimum, remand for a proper determination regarding personal jurisdiction. Contrary to the suggestion of the United States, the Petition in this case expressly argued the personal jurisdiction issue as a basis for granting *certiorari* on the ERISA issue. Pet. at 18.

Finally, if there is no ERISA cause of action available in this case, the award of attorney's fees entered below cannot stand, since it is premised solely on ERISA.

against petitioner—plainly is legal, not equitable. In *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2068 (1993), this Court stated plainly that "[m]oney damages are, of course, the classic form of *legal* relief." *See* Pet. Br. at 17 & n.8; *see also Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 134-37 (2d Cir. 1991) (carefully analyzing origin of doctrine of veil piercing and concluding that the doctrine "had equitable and legal components"; accordingly, action to pierce veil of judgment debtor to impose uncollected judgment on alleged alter egos, as an action which sought monetary damages, was legal and not equitable); 1 W. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, 1994 Cum. Supp. at 45 (veil piercing held to be legal issue where it "turns chiefly on disputed fact questions and the relief sought consists of damages").

Respondent and his *amicus* AARP seek to evade this principle by asserting that the remedy obtained here is an equitable "restitutionary" or "restorative" remedy. Resp. Br. at 9; AARP Br. at 11-12. This plain misstatement serves only to emphasize the legal nature of the remedy here. Petitioner was not directed to restore to Tru-Tech (and thence for the benefit of all its creditors) the notes and receivables that were transferred to Grant Peacock & Co.; he instead was subjected to a personal money judgment for $187,628.93, to be paid directly to respondent. The judgment below went far beyond "restoration" of the transfers out of Tru-Tech, imposing damages at more than twice the value of the property transferred.[2] The judg-

[2] As we have explained, the face value of the transfers at issue was less than $60,000—and their actual value was even less. Pet. Br. at 8 n.3. *Amicus* United States places the value at $80,000, presumably by failing to deduct from the transfers the cash paid for the $25,000 Uhlman note. U.S. Br. at 3; *see* C.A. 4 App. at 168. Even if one uses the United States' figure, and further assumes *arguendo* that no consideration was given for the transfers, the damages award alone in this case far exceeds any benefit obtained by petitioner. (Of course, the unrefuted evidence shows that the transfers in this case—contrary to the implication of the facile term "siphoning" favored by respondent—*were* supported by full and valid consideration. Pet. Br. at 8 n.3.) This is not a restitution case.

ment at issue here *improved* the *Tru-Tech* judgment by making collectible in full, out of petitioner's assets, what could not have been collected from Tru-Tech, which was insolvent even before the transfers in question.

2. Moreover, Section 502(a)(3) of ERISA could not salvage the judgment below, even if piercing the veil were an equitable remedy. Section 502(a)(3) authorizes equitable relief *only to redress a violation of ERISA or an ERISA plan*. ERISA "does not, after all, authorize 'appropriate equitable relief' *at large*." *Mertens*, 113 S. Ct. at 2067. In this lawsuit, there is no allegation of a violation of ERISA or a plan—indeed the suit makes no specific mention at all of the statute or the plan document. Instead, what is sought here is nothing more or less than relief "at large." Petitioner's alleged wrong is a violation of common law legal principles governing the corporate form, *not* a violation of anything contained in ERISA or an ERISA plan. Thus, Section 502(a)(3), which is directed narrowly at relief for ERISA violations, cannot apply.[3]

B. Federal Common Law.

1. Absent any express statutory cause of action to pierce the veil of an ERISA judgment debtor, this case can arise under ERISA only if the Court is willing to create a federal common law cause of action where ERISA does not.

This Court has considered and rejected the arguments for such a judicial rewriting of ERISA in *Mertens*. The Court refused "to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 113 S. Ct. at

[3] *See Reich v. Rowe*, 20 F.3d 25, 29 (1st Cir. 1994) (interpreting similar language of Section 502(a)(5) of ERISA to limit available relief to redress of a violation of terms of ERISA).

2067 (internal quotations omitted); *see* Pet. Br. at 15-17; *see also United States v. Cordova Chem. Co.*, 59 F.3d 584, 590 (6th Cir. 1995) (rejecting a federal common law standard for piercing the corporate veil of a subsidiary to hold the parent liable as an "operator" under CERCLA; noting that Congress could have abandoned "traditional concepts of limited liability associated with the corporate form" had it chosen).

Mertens is squarely on point in its refusal to create an extrastatutory remedy for damages against a nonfiduciary. Moreover, it is the decisional principle of *Mertens*—that ERISA is a finished work, not merely a congressionally created scaffold on which the judiciary may mount whatever remedies it sees fit—that is crucial here. *Mertens* applies, and mandates reversal, because respondent seeks to assert under the rubric of ERISA a cause of action contained nowhere in ERISA.[4]

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[4] Respondent's *amici* Central States (at 8-9) and NCCMP (at 13) refer to this Court's statement that "courts are to develop a federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (internal quotations omitted). The context of this statement, however, is that "ERISA abounds with the language and terminology of trust law," and accordingly that in construing ERISA the Court will be "guided by principles of trust law." 489 U.S. at 110-11.

There is a broad gulf between the principle stated in *Firestone*, that the common law understanding of trust law principles should be used in *interpreting* the text of ERISA, and the proposition advanced here and rejected in *Mertens*, that resort may be had to the common law to *create* an action that Congress declined to provide in enacting ERISA. *See Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643-45 (1981) (power to interpret common law terms of Sherman Act does not give courts "the power to alter or supplement the remedies enacted"); *Buckley Dement, Inc. v. Travelers Plan Adm'rs*, 39 F.3d 784, 789-90 (7th Cir. 1994) (common law to be used in "implement[ing] the provisions of ERISA," not "augment[ing]" them). Moreover, veil piercing is not a trust law doctrine. *See Reich v. Compton*, 57 F.3d 270, 278 n.12 (3d Cir. 1995) (alter ego doctrine not part of the common law of trusts "upon which Congress engrafted ERISA" (citing *Firestone*); this "is not surprising given that the alter ego doctrine originally developed in the context of corporate law").

Faced with this controlling principle, those urging affirmance advance variations on the "more money" argument, *i.e.*, that the "purpose" of ERISA requires that every judicial decision must be tailored to maximize the recovery of ERISA claimants. *See, e.g.*, Resp. Br. at 15 (ERISA beneficiary "has a higher degree of expectation for recovery"); Bricklayers Br. at 16 (Congress has amended ERISA to give it "teeth" for recovery of delinquent contributions). This Court has flatly rejected that argument in *Mertens*, 113 S. Ct. at 2071, and in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) ("there is no federal policy that the fund should always win"); *see* Pet. Br. at 16-17 & n.7.

2. Several *amici* representing multiemployer pension plans urge the Court to recognize a general federal common law of veil piercing under ERISA, because they are concerned about a different kind of case—one in which a multiemployer plan seeks to pierce the veil of a moribund corporation in order to have the corporation's alter ego declared the "employer" under Sections 3(5) and 515 of ERISA, 29 U.S.C. §§ 1002(5), 1145, for purposes of fulfilling contribution obligations to the plan. Rather than simply identifying this issue as one not presented here, these *amici* urge affirmance on the basis of an analogy between (a) the "employer contribution" scenario and (b) an attempt to pierce the veil of a breaching corporate fiduciary in order to declare the alter ego also to be a breaching *fiduciary*. *E.g.*, Bricklayers Br. at 12 & n.15; Central States Br. at 6, 9; NCCMP Br. at 15.[5]

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[5] Even in the employer contribution context, *amici* significantly overread certain decisions. *See, e.g., Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 26, 27 (1st Cir. 1988) (Breyer, J.) (panel bound by prior Circuit opinion in *Alman* regarding source of law; dealing in *dictum* with circumstance in which alter ego was "already obligated"; *i.e.*, was the alter ego at the time obligation was entered); *Connors v. P&M Coal Co.*, 801 F.2d 1373, 1378 (D.C. Cir. 1986) (joined by Ginsburg & Scalia, JJ.) (*dictum* noting other decisions; does not address federal common law issue).

Assuming *arguendo* that veil piercing is available in the employer contribution case, the proposed analogy collapses in this fiduciary liability case because of the difference between fiduciary liability for breach and employer liability for contributions. Fiduciary liability requires a finding that the fiduciary was guilty of some breach of duty—*while acting as a fiduciary*. Indeed, Section 409 of ERISA, which provides for fiduciary liability for breach of duty, expressly states that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty . . . if such breach was committed *before he became a fiduciary or after he ceased to be a fiduciary*." 29 U.S.C. § 1109(b) (emphasis added). If an individual meeting ERISA's functional definition of fiduciary—that is, having discretionary authority or control over a plan[6]—commits a breach, then there is fiduciary liability; the veil piercing inquiry can add nothing to the statutory test. If the aim of piercing the veil is to declare that the individual was a fiduciary at the time of the wrong, then the proper and only inquiry is the statutory test of whether the individual exercised discretionary authority or control. If so, the individual is a fiduciary regardless of corporate form. Pet. Br. at 18-19. On the other hand, if the purpose of the veil piercing inquiry is, as appears to be the case here, to declare that the individual *later* became a fiduciary and is therefore responsible for a *prior* ERISA wrong, then liability is precluded by Section 409(b) of ERISA. In either event, veil piercing has no place in the fiduciary liability analysis.

Petitioner was conclusively adjudged *not* to be a fiduciary of the Tru-Tech plan at the time of the breach of fiduciary duty that supports the *Tru-Tech* judgment. *See* U.S. Br. at 25 (petitioner's liability "was not premised on" ERISA violation). Further, it is universally acknowledged that the events alleged to support veil piercing here occurred after the fiduciary breach. Thus, pursuant to

[6] As *Mertens* points out, this definition expands beyond the common law "the universe of persons subject to fiduciary duties—and to damages." 113 S. Ct. at 2071.

ERISA Section 409(b), the one thing that this case absolutely cannot be about—and the misplaced focus of the *amici* multiemployer plans—is whether Tru-Tech's corporate veil can be pierced to make petitioner a fiduciary with respect to the breach in this case. *See* Central States Br. at 6.

3. From the foregoing, it is clear that respondent has no cause of action, either express or implied, arising under ERISA. The only remaining argument for application of federal law in this case is that the statute should be supplemented by creation of a federal common law rule of decision for imposition of liability on persons claimed to be the alter ego of a federal judgment debtor.[7]

In a word, *O'Melveny* is dispositive. There, the FDIC sought application of a federal common law rule of decision in a professional negligence and breach of fiduciary duty case brought against a law firm that had represented a failed bank. This Court held that state law governed, noting that it would not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed," 114 S. Ct. at 2054, and that even in the absence of such a comprehensive statutory framework, no federal rule of decision would be adopted in the absence of "a significant conflict between some federal policy or interest and the use of state law," *id.* at 2055 (internal quotation omitted).

First, ERISA is precisely the kind of "comprehensive and detailed" statute that calls for no judicial additions. The lack of need for federal common law accretions is especially clear with respect to ERISA because of its express preemption provision. When a matter, such as this one, is plainly beyond the reach of a preemption provision, the lack of federal interest in imposng a common law rule of decision becomes even clearer. Pet. Br. at 21-24; *see Mackey v. Lanier Collection Agency & Serv.*,

[7] The United States does not join those seeking federalization of this corporate law doctrine. U.S. Br. at 25.

486 U.S. 825, 834 (1988) (leaving "state-law methods for collecting money judgments . . . undisturbed by ERISA").

Nor is there any "significant conflict" here between federal policy and state law principles. There is no suggestion that some states do not recognize veil piercing (or provide for the voiding of preferential transfers, the more appropriate remedy here). *See Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977) (declining to "federalize" state corporate law "[a]bsent a clear indication of congressional intent"; noting the general understanding that state law will govern corporate affairs unless "federal law *expressly*" states to contrary).[8]

The Fourth Circuit clearly erred in imposing liability on petitioner on the basis of a "liberal [federal common law] veil-piercing standard" created especially "for use in ERISA actions." Pet. App. 23a. Even if this Court concludes that this action is properly within the federal courts' ancillary jurisdiction, the matter will have to be remanded for proper application of a state law rule of

[8] Incredibly, three *amici* ask this Court to create a federal common law rule of veil piercing for *every* attempt to collect a federal judgment. Bricklayers Br. at 11 (championing the "universally recognized federal veil piercing doctrine"); NCCMP Br. at 11-12 (urging veil piercing in every case "where a federal judgment is sought to be enforced"); Central States Br. at 9-10 ("[v]eil piercing is a federal common law matter where the liability of the corporation is created by federal statute"). These *amici* mischaracterize *Anderson v. Abbott*, 321 U.S. 349 (1944), a narrow preemption case. In *Anderson*, the National Bank Act itself expressly pierced the corporate veil and made shareholders of national banks directly liable for certain debts. 321 U.S. at 369 n.1 (quoting statute). The Court held a Delaware statute preempted that allowed evasion of the federal statute by the simple interposition of a holding company owning all the stock of the national bank, with the holding company's shareholders having limited liability. *Id.* at 365. The *Anderson* court expressly noted the narrowness of its holding: "*Barring conflicting federal incorporation statutes*, Delaware may choose such rules of limitation on the liability of stockholders of her corporations as she desires." *Id.* (emphasis added). Of course, there is no federal incorporation statute at issue here.

decision on the merits, and proper determination of personal jurisdiction. *See supra* note 1.[9]

II. THERE IS NEITHER A CONSTITUTIONAL BASIS NOR A POLICY JUSTIFICATION FOR ANCILLARY JURISDICTION OVER THIS STATE LAW MATTER.

1. Respondent and several *amici* ask this Court to hold that any action, the goal of which is to obtain assets for a holder of a federal judgment, is itself a federal action. The incredible breadth of this "asset-finding" jurisdiction is in sharp contrast to this Court's prior decisions, which clearly delineate the limited circumstances in which a matter that shares no common nucleus of operative fact with a federal action can nevertheless be called part of the same constitutional "case." Under these decisions, a plaintiff can bring such an action in federal court only when (a) the *res* that is the subject of the lawsuit has been attached or is otherwise in the actual or

[9] The rule adopted below also departs from black letter principles of veil piercing law, both (i) in imposing liability on petitioner for wrongs that occurred before he was alleged to be Tru-Tech's alter ego, *see* Pet. Br. 26 n.16; 1 Fletcher § 43.10 ("control must . . . have been exercised at the time the acts complained of took place": control "must proximately cause the injury"), and (ii) in allowing recovery beyond the amount of the allegedly improper transfers, 1 Fletcher § 45 (where transfers "may be avoided as fraudulent conveyances, disregard of the corporate entity is unnecessary").

In light of this inconsistency with general principles of veil piercing law, the Fourth Circuit's brief *dictum* that the rule in this case "accords with [its] understanding" of South Carolina law, Pet. App. 22a n.16, cannot forestall a more searching inquiry into the appropriate state law remedy. *See Miree v. DeKalb County*, 433 U.S. 25, 33 (1977) (where court of appeals incorrectly disposed of case by creating federal common law, remanding to apply state law and reexamine prior *dicta* concerning state law). First, it is not clear that South Carolina law would govern here. In any event, as the Government notes, there does not appear to be South Carolina authority on the limitation of the veil-piercing remedy when it is based on preferential transfers, U.S. Br. at 27 n.19; nor are we aware of South Carolina authority that an alter ego may be made liable for acts occurring before the veil could be pierced. These state law questions should be certified to the appropriate state court on remand, if remand is necessary.

constructive possession of the court (a situation not presented here), or (b) the second action involves a matter already litigated by the parties (or their privies) and embodied in an order of the court. *See infra* pp. 12-16. If the line is not drawn at the boundaries of the terms of the court's prior order, there is no principled place at which it can be drawn.[10] Under respondent's proposed rule, "the post-judgment pursuit of a questionable gambling debt allegedly due the defendant," *Skevofilax v. Quigley*, 810 F.2d 378, 389 (3d Cir. 1987) (*en banc*) (Becker, J., concurring), would be ancillary.

This line is reinforced by this Court's numerous admonitions that ancillary jurisdiction may be exercised only if it is "necessary" or "essential" to protection of the federal court's existing federal question or diversity jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1677 (1994) (matter must be "essential to the conduct of federal-court business"); Pet. Br. at 36. When the putatively ancillary matter does not involve rights to a *res* in the hands of the court, and cannot be resolved by reference to what the federal court has already decided (so that decision of the matter cannot be said to threaten to undermine the court's prior decision), then resolution of the new matter by the federal court cannot be said to be "necessary." In a *Kokkonen*-type situation, for instance, it could easily be argued that the flouting of a settlement agreement entered for the express purpose of obtaining dismissal of a federal action is an affront to the dignity and functioning of the court,

[10] Respondent and his *amici*, as did the Fourth Circuit, rely on the proposition that an attempt to pierce the corporate veil is "subsidiary to some primary cause of action" to suggest that a veil-piercing claim must always be ancillary. Pet. App. 12a, 16a; *see* Resp. Br. at 8. The conclusion does not follow. Veil piercing is "subsidiary" in the limited sense that liability does not flow simply because the veil can be pierced; there must be an independent wrong, and the alter ego must have responsibility for that wrong. *See supra* note 9. This concept has nothing to do with ancillary jurisdiction, especially here, where there is no claim that the veil piercing has any factual connection to the prior wrong.

undermining its authority and the "spirit" of its order. *Kokkonen* makes clear, however, that this sort of activity beyond the scope of a federal court order, even if inconsistent with the spirit of that order, is not enough for ancillary jurisdiction. As this Court's prior decisions demonstrate, it is not "necessary" for the federal court to take up the matter unless property in its possession, or the express terms of its order, are at issue. *See Owen Equip. & Erec. Co. v. Kroger*, 437 U.S. 365, 377 (1978) ("neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction").

The *Tru-Tech* order did not attach Tru-Tech's assets, and petitioner was not held liable here for violating the terms of the *Tru-Tech* order. The common law of veil piercing, not the terms of the *Tru-Tech* order, supplied the controlling legal principle below. It was thus not "essential" to vindication of the *Tru-Tech* order that this new allegation, involving facts never before presented, and a new trial, be heard in federal court.[11]

2. Neither respondent nor any *amicus* contends that federal court jurisdiction can be premised here on the familiar common nucleus of operative fact test.[12] Nor is

[11] We emphasize that we are not contending that there is no remedy for the wrong alleged here. The point here is that Article III places a limit on the ability of the federal courts to hear all claims that come before them.

[12] This distinguishes *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329 (1887). There, a defendant brought a counterclaim for a fraudulent transfer against both a diverse plaintiff and a non-diverse third party. *Id.* at 331-32. The fraudulent transfer claim against the third party was of course factually interdependent with the identical counterclaim against the plaintiff, who was still before the court and over whom there was proper jurisdiction.

The fact that *Dewey* involved a counterclaim is also critical. As this Court has noted, ancillary jurisdiction "has often been upheld in situations involving impleader, cross-claims or counterclaims," since ancillary jurisdiction serves there to allow to be heard "claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could

this a case in which the property at issue has been attached or otherwise placed in the court's possession. Although the Government cites these latter cases, they are readily distinguishable. As the Government acknowledges, their *in rem* character justifies ancillary jurisdiction over the parties and disputes surrounding the *res*, since the alternative would be to leave claimants not before the court without an effective remedy. U.S. Br. at 14 & n.7.[13] *See Finley v. United States*, 490 U.S. 545, 551 (1989) (ancillary jurisdiction available "when an additional party has a claim upon contested assets within the court's exclusive control"). Of course, affirmance of the Fourth Circuit would sweep away the carefully drawn distinctions in this line of cases; there will never again be a need for execution or attachment in federal court if any party receiving unattached property claimed by a judgment debtor can be haled into court on that basis alone.

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assert them in an ongoing action in a federal court." *Owen*, 437 U.S. at 375-76; *see also Dery v. Wyer*, 265 F.2d 804, 807 n.3 (2d Cir. 1959) (characterizing *Dewey* as involving a compulsory counterclaim). Plainly, if *Dewey* had involved an attempt by a *plaintiff* to assert ancillary jurisdiction over a third party not otherwise before the court, the attempt would have failed under the doctrine of *Owen*, which refused to allow a plaintiff, after a non-diverse third-party defendant was added by the defendant, to assert a factually related claim against that third-party defendant.

[13] *See Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 693 (1950) (in admiralty, federal court has jurisdiction to determine "[d]isputes over ownership of attached vessels" to ensure propriety of attachment); *Alexander v. Hillman*, 296 U.S. 222, 237-38 (1935) (in a receivership, receivers "may sue to recover any part of the res"; the issue before the Court in this case was in any event *personal* jurisdiction, not subject matter, *id.* at 231, 242; the Court also remarked on the existence of common issues of fact, *id.* at 243); *Krippendorf v. Hyde*, 110 U.S. 276, 280-86 (1884) (party claiming to own property attached in federal court proceeding may assert title in that proceeding; noting that attached property "is regarded as in the custody of the court"); *Minnesota Co. v. St. Paul Co.*, 69 U.S. (2 Wall.) 609, 632 (1864) (if property is "in the hands of the receiver of the Circuit Court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties").

Indeed, the availability of *in rem* ancillary jurisdiction underscores, in two ways, that the instant action is not properly regarded as ancillary. First, *Kokkonen* emphasizes that ancillary jurisdiction is improper when the court and the parties could have provided in the original order for a broader retention of jurisdiction. 114 S. Ct. at 1677. Here, no asset of Tru-Tech was attached.

Second, respondent had the option of instituting an involuntary bankruptcy proceeding (an *in rem* proceeding) against Tru-Tech *after* respondent discovered the allegedly improper transfers. *See* 11 U.S.C. § 303. Even if one assumes *arguendo* that state court proceedings are somehow inadequate, bankruptcy offers a congressionally created federal court proceeding to protect creditors such as respondent against improper transfers. *See id.* §§ 541-544, 547. Of course, bankruptcy law also provides protections for *other* creditors against preferential treatment of one creditor, such as respondent, including rules governing notice and distribution of assets. *See id.* §§ 342, 507, 726. These protections are not part of the *ad hoc*, judicially created ancillary remedy sought by respondent.[14]

3. Federal court ancillary jurisdiction could be justified here only if it were necessary to protect the court's prior judgment. This Court's cases make it clear that the federal court's role in protecting a judgment is coterminous with the terms of that judgment; if the putatively ancillary proceeding seeks a result or relief different from what is provided in the main case, the second proceeding is not merely an extension of the same constitutional case, but requires its own jurisdictional basis. *See Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937) (jurisdiction to enforce prior decree is available *if* "the relief be not of a different kind or on a different principle"); *see also* Pet. Br. at 39. This case, with new

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[14] Respondent's claim constituted only about 15 percent of Tru-Tech's total indebtedness. C.A. 4 App. at 162-63. Of Tru-Tech's remaining creditors, petitioner, who was personally owed $344,000 by Tru-Tech, was among the largest. *Id.* at 162.

parties and new matters necessitating a new trial, plainly goes beyond enforcing the terms of the *Tru-Tech* judgment. *See Berry v. Lemore*, 195 F.2d 452, 455 (5th Cir. 1986) ("We can find no case where a court held it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment.").

The cases relied on by respondent and his *amici* (other than the factual interdependence and *in rem* cases discussed *supra*) amount to nothing more than application of principles of *res judicata* against parties to the prior action or their privies. As this Court has noted, ancillary jurisdiction exists "to avoid the relitigation of questions once settled between the same parties." *Root v. Woolworth*, 150 U.S. 401, 410-11 (1893).[15]

For instance, in *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), a case relied on heavily by the Government, the respondent had received a discharge in bankruptcy of all debts, including the one owed the petitioner. The petitioner, as a creditor with notice, was thus bound as a party under *res judicata* principles. *See, e.g., Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940). The petitioner nevertheless brought a

[15] The Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits interference in state court proceedings by federal courts, contains a "relitigation exception" that allows stay of a state court proceeding "to protect or effectuate" federal court judgments —the language used to describe the scope of ancillary jurisdiction. *See Dugas*, 300 U.S. at 428 (ancillary bill may be brought "in aid of and to effectuate" prior federal decree); *Kokkonen*, 114 S. Ct. at 1676 (court has "power to protect its proceedings and vindicate its authority"). The "protect or effectuate" language, which has been construed as "essentially a res judicata concept designed to prevent" relitigation, *Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir. 1993), will justify federal injunction of a state proceeding only where the "federal court's flexibility and authority to decide" the case is "seriously impair[ed]." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986). This line of authority supports limiting ancilliary jurisdiction to matters falling within the bounds of prior court orders.

post-discharge action in state court to enforce an assignment of wages given to secure the debt. *Local Loan* holds that there is ancillary jurisdiction over the respondent's subsequent proceeding seeking, *on the basis that the debt had already been discharged by the federal court*, to enjoin the petitioner's state court suit. 292 U.S. at 238-39.

Dugas is to similar effect. There, a surety availed itself of the federal Interpleader Act in order to satisfy claims lodged against it in excess of its bonding obligation. After the federal court entered its order extinguishing the claims, claimant Dugas pursued a state court action to collect additional money from the surety. This Court affirmed jurisdiction over the surety's supplemental bill seeking to enjoin Dugas from further pursuing the state court action. In so doing, the Court was careful to emphasize that Dugas' actions were in direct contravention of the court's decrees. 300 U.S. at 426-27. A federal court has jurisdiction to see that its decrees are given effect, "*but subject to the qualification* that the relief be not of a different kind or on a different principle." 300 U.S. at 428 (emphasis added). *See also Riverdale Cotton Mills v. Alabama & Ga. Mfg. Co.*, 198 U.S. 188, 195 (1905); *Minnesota Co.*, 69 U.S. at 632.

The rulings in *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1868) and *Labette County Commissioners v. United States ex rel. Moulton*, 112 U.S. 217 (1884), are not to the contrary. Each case involved municipal liability on bonds, adjudicated in federal court. The subsequent proceedings were brought, not to establish the liability of a different party for those judgments, but simply to order persons, *in their official capacities*, to cause the judgments to be satisfied.[16] In this sense, the

[16] It did not matter that the bonds in *Labette County* were those of a township, while the enforcement order was directed to county officials. The township bonds were issued by the county commissioners and, pursuant to state law, it was the county commissioners who had the authority to levy the tax to pay those bonds. *See* 112 U.S. at 218, 222. The Court properly emphasized that the county

orders in question are simply "a substitute for the ordinary process of execution to enforce the payment" of the judgment against the original defendant. *Riggs*, 73 U.S. at 198. Because these were actions against county officers in their official capacities, "the real party in interest . . . is the entity represented and not the individual officeholder." *Karcher v. May*, 484 U.S. 72, 78 (1987). Here, by contrast, petitioner was sued in his *individual* capacity for *personal* liability and the judgment against him is not the mere application of *res judicata*.[17]

The action here is not one seeking merely to enforce or to avoid relitigation of matters already decided by the court. As respondent puts it, this is an action "to *establish liability* on the part of" petitioner. Resp. Br. at 4. That does not describe *Riggs* or *Labette*, or any of this Court's other ancillary jurisdiction cases. It does describe the universal understanding of a separate constitutional "case," one that must have its own jurisdictional basis.

4. This is the conclusion reached by this Court in *H.C. Cook Co. v. Beecher*, 217 U.S. 497 (1910). *Beecher* confirms that ancillary jurisdiction stops short of separate lawsuits, involving new facts and claims, brought to impose liability on a third party. *See* Pet. Br. at 29-31.[18]

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commissioners "are not strangers" to the judgment, "but are bound by it, *as it stands*." *Id.* at 221 (emphasis added).

[17] To the contrary, this Court has held that a judgment's *res judicata* effect cannot be applied to a non-party to the initial action who is alleged to be an alter ego, until that non-party, in a second action, is found after a new trial in fact to be an alter ego. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 111 (1969). *Zenith*, and common sense, thus refute the Government's argument that an action to establish the alter ego status of a non-party is merely an action to execute the judgment. *See* U.S. Br. at 12. Accordingly, Fed. R. Civ. P. 69(a) is irrelevant. *See also* Fed. R. Civ. P. 82 ("These rules shall not be construed to extend . . . the jurisdiction of the United States district courts").

[18] The United States, U.S. Br. at 12, relies on *Alexander v. Hillman* in criticizing the argument that this lawsuit is a new "case" because it involved new parties, new facts, a new caption,

Faced with the intractable likeness of *Beecher* to this case, the United States suggests that the holding in *Beecher* that the second suit was not ancillary to the first is "best regarded as dictum." U.S. Br. at 21. The Government goes on to suggest that the claim in *Beecher* was "truly independent," and thus not ancillary, on the theory that it stated "a pure state law claim." *Id.* at 22-23.

Neither posited distinction withstands scrutiny. First, *Beecher* plainly is an ancillary jurisdiction case. The circuit court's decision was based squarely on the lack of jurisdiction, and that court ruled directly that there was no ancillary jurisdiction. *H.C. Cook Co. v. Beecher*, 172 F. 166, 167 (C.C.D. Conn 1909) This Court agreed with the circuit court that the suit had to be viewed as "an attempt to make the defendants answerable for the [federal court] judgment already obtained," and affirmed the ruling that such a matter belonged in state court, not federal court. 217 U.S. at 498. This holding cannot be squared with the ruling below that this attempt to make petitioner liable for "the judgment already obtained" can be maintained in federal court.

As to the second proffered distinction of *Beecher*, there is no more or less "a pure state law claim," U.S. Br. at 23, here than there was in *Beecher*. The Government argues that the claim against petitioner was not "pure" (the Government *does* view it as a state law claim, U.S. Br. at 25) because it is premised on a "scheme" to defeat a federal judgment. We submit the availability of federal jurisdiction over a state-law tort action should not turn on whether the complaint alleges that the tort was com-

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and a new complaint. We submit that Article III's definition of "case" must be understood at least in part in terms of the common understanding of the term "case"—that is, a discrete lawsuit begun with a summons and complaint to resolve a circumscribed dispute. *Hillman* supports this view. There, this Court based its conclusion that the ancillary bill did not commence a new suit on the "fact that process was not prayed or issued." 296 U.S. at 239. What the United States calls "notions of formal pleading" are actually reflections of the natural meaning of the word "case."

mitted with one eye on a federal judgment. Moreover, this proposed standard does not distinguish *Beecher*. The defendants there were accused, as is petitioner here, of carrying out a course of action with the knowledge that it would deplete the assets of the corporation and render any judgment rendered against the corporation uncollectible. 217 U.S. at 498.[19] The thrust of these allegations is made particularly plain by reference to the brief filed with this Court by the Plaintiff in Error in *Beecher*. At pages 8-10, the Plaintiff in Error argues that the directors set out to make as much money as they could off the alleged infringement during the pendency of the suit, to pay that money out of the corporation, and to leave the corporation unable to respond to a judgment.[20]

5. The United States agrees with us that congressional intent is relevant "to the scope and proper exercise of a court's ancillary jurisdiction." U.S. Br. at 19. The Government, however, argues that the breadth of ERISA implies that the federal courts should be commensurately expansive in asserting ancillary jurisdiction over actions purporting to collect ERISA judgments.

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[19] For this reason, the distinction of *Beecher* suggested by *amicus* AFL-CIO—that *Beecher* is different because it involves pre-judgment conduct only—plainly fails. *See* AFL-CIO Br. at 11-12 (suggesting distinction and then admitting its meaninglessness). If anything, the behavior in *Beecher* would be more amenable to ancillary jurisdiction than the allegations here, because the conduct in *Beecher* took place while the underlying matter was actually before the court.

[20] The United States also points to *Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295 (2d Cir. 1927) in attempting to distinguish *Beecher*. The result in *Empire Lighting*, and hence its distinction of *Beecher*, turns on a peculiarity of New York law. As *Empire Lighting* explains, a fraudulent conveyance is *void* under New York law, with the result that a suit to set it aside is "not therefore essential," and can therefore be regarded as "in substance an equitable execution" against the debtor itself. 20 F.2d at 296-97; *see J.M. Resources Inc. v. Petro-Pak Resources, Ltd.*, 581 F. Supp. 629, 633 (D. Colo. 1984) (denying jurisdiction and distinguishing *Empire Lighting* on grounds that it reads New York law to regard the debtor as "still own[ing] the property").

This Court's decisions establish the opposite—that the breadth of ERISA counsels against judicial expansion. This Court's cases have repeatedly made clear that where Congress has set out to supply comprehensive regulation of an area of law, the judicial assumption is that Congress has accomplished all that it set out to do, and *not* that sweeping congressional action is an invitation to the courts to try their own hands at further regulation. *Mertens*, 113 S. Ct. at 2071; *O'Melveny*, 114 S. Ct. at 2054. It is particularly inappropriate to expand jurisdiction to new parties that Congress chose not to reach. *See Finley*, 490 U.S. at 549 ("with respect to the addition of parties," the Court "will not read jurisdictional statutes broadly").

6. Respondent and his *amici* do not disagree that prudential concerns may limit the exercise of ancillary jurisdiction. *See* Pet. Br. at 42-43. Rather, the United States appears to take the extraordinary position that it is the district courts alone that have the role of setting those prudential limits, on a case-by-case basis. U.S. Br. at 18-19.

That position is contrary to this Court's holdings in standing and ripeness cases, where the Court itself has set and applied prudential limits. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474-75 (1982); *see also Local Loan*, 292 U.S. at 241 (describing circumstances under which federal court, with power to hear ancillary proceeding, should nonetheless decline). Recognizing ancillary jurisdiction in this case would, as several *amici* concede, open the doors of the federal courts to all manner of actions "to identify . . . those parties who are liable," Pet. App. 13a, and to reach their assets for satisfaction of *all* federal judgments. *See, e.g.*, AFL-CIO Br. at 2; AARP Br. at 11 n.6, 15 ("it makes no difference under what federal statute the judgment was adjudicated"). These asset finding actions will invariably involve not only new parties but new theories of liability, and require a new trial, as happened here. *See, e.g.*,

Zenith Corp., 395 U.S. at 111 (determination of alter ego status requires new trial).

Furthermore, the volume of *amici* urging this Court to approve of federal "asset-finding" jurisdiction is itself sufficient to show that these matters would likely impose a substantial burden on federal court dockets. "Asset-finding" forays against third parties by federal judgment creditors—in diversity as well as federal question cases, for there is no principled basis for distinguishing among types of federal judgments for purposes of ancillary jurisdiction—could rest on a wide variety of state law theories, and they might easily be instituted years after the primary action. Moreover, these cases would require the federal courts to determine what notice, intervention, and distribution mechanisms to create in order to protect the claims of *other* creditors to the same disputed assets. *See, e.g., Krippendorf*, 110 U.S. at 281-86 (noting necessity of allowing intervention by third party with asserted interest in property). Federal court jurisdiction over such actions is neither "necessary nor even particularly efficient." *Kokkonen*, 114 S. Ct. at 1676.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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